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In the
# Supreme Court of the United States

ALABAMA-TOMBIGBEE
RIVERS COALITION, ET AL.,

*Petitioners,*

v.

DIRK KEMPTHORNE, SECRETARY
OF THE INTERIOR, ET AL.,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITIONERS' REPLY BRIEF

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## ARGUMENT

### I

### REVIEW IS WARRANTED TO ADDRESS AN IMPORTANT QUESTION OF FEDERAL LAW

If the Constitution is to act as a constraint on federal authority, if the commerce power has any limitations whatsoever, then it is incumbent on this Court to say so in this case. Under cover of the Commerce Clause, the Eleventh Circuit effectively held Congress could exercise complete federal control over all land and water resources, both public and private, to protect the "biodiversity" of species and their "ecosystems." Pet. App. A42-A43, A45-A46. But there is no rational basis upon which Congress could conclude that the regulation of an intrastate, noncommercial species—like the Alabama sturgeon in this case—could have sufficient ties to interstate commerce to justify regulation under the Commerce Clause within the permissible scope defined by this Court.

If Congress can pass laws under the commerce power regulating any activity that affects protected species, there is no human endeavor beyond federal control. This cannot be squared with this Court's Commerce Clause decisions or the Constitution. *See GDF Realty Inv., Ltd. v. Norton*, 362 F.3d 286, 291-292 (5th Cir. 2004) (dissent to the denial of rehearing en banc). It is axiomatic "that the Commerce Clause regulates commerce, not ecosystems." *Id.* at 292.

This Court has recognized that otherwise constitutional enactments may be invalid in some applications but this Court has never applied its

Commerce Clause analysis to the Endangered Species Act. It should do so now. "[M]any applications of the ESA may be constitutional, but this one [the regulation of an intrastate, noncommercial species] simply goes too far." *Id.* at 293.

## II

## REVIEW IS WARRANTED TO ADDRESS A CONFLICT AMONG THE CIRCUITS

If ensuring constitutional safeguards are not sufficient in themselves to warrant review by this court, there are other reasons. Petitioners, and more extensively amici, have already observed that as to the ESA the circuits have adopted irreconcilable rationales in support of a limitless commerce power.

In his dissent to the denial of rehearing en banc in *Rancho Viejo, LLC v. Norton*, 334 F.3d. 1158 (D.C. Cir. 2003), then Judge Roberts noted the panel opinion "in effect asks whether the challenged *regulation* substantially affects interstate commerce, rather than whether the *activity* being regulated does so." *Id.* at 1160. This focused the court on Rancho Viejo's commercial development rather than on the incidental taking of arroyo toads—an approach seemingly "inconsistent with the Supreme Court's holdings in *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed.2d 626 (1995), and *United States v. Morrison*, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed.2d 658 (2000)." As the judge observed, this rationale would have lead to a different result in those cases and was at odds with the Fifth Circuit in *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622, 634-635 (5th Cir. 2003): "As the Fifth Circuit explained, 'looking primarily beyond the regulated activity . . . would "effectually

obliterate" the limiting purpose of the Commerce Clause,' and, under such an approach, 'the facial challenges in *Lopez* and *Morrison* would have failed.'" *Rancho Viejo,* 334 F.3d at 1160. That approach "conflicts with the opinion of a sister circuit"—the Fifth Circuit in *GDF Realty. Id.*

Of course, the conflict is much more pervasive than those two cases. After an extensive examination of the circuit court decisions that have addressed Commerce Clause challenges to various applications of the ESA, amici identified numerous conflicts. The Fourth Circuit in *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), focused on the *regulated* species, the Fifth Circuit in *GDF Realty* on all species, and the D.C. Circuit in *National Association of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) and *Rancho Viejo*,on the *actor*. *See* Amici Brief National Water Resources Association, et al., in Support of Petition at 20. In this case the Eleventh Circuit employed the "biodiversity" and "ecosystem" approach used by the Fifth Circuit in *GDF Realty* and the D.C. Circuit in *NAHB*. *Id.* at 21. But that decision conflicts with the decisions in *Gibbs* and *Rancho Viejo* which focused, respectively, on the commercial effects of the regulated species and the commercial activities of the actor. *Id.*

These conflicts among the circuits on such a question of national importance—the constitutionality of regulating for the protection of intrastate, noncommercial species—provides an independent basis for granting the writ of certiorari in this case.

## III

## REVIEW IS WARRANTED TO ADDRESS THE GOVERNMENT'S INABILITY TO ARTICULATE A CONSISTENT CONSTITUTIONAL BASIS FOR REGULATING THE ALABAMA STURGEON

Aside from the conflict among the circuits, another independent basis for review is provided by the government itself. The government opposition floats at least seven different theories for upholding the ESA against the Commerce Clause challenge in this case. They include: (1) that Congress may regulate an agency's own actions, Opp. at 7; (2) that Congress can regulate Petitioners' own commercial activities, Opp. at 9; (3) that Congress has authority to regulate activities in navigable waters as channels of commerce, Opp. at 10; (4) that regulation of the Alabama sturgeon is appropriate because the fish may become commercially viable in the future, Opp. at n. 5; (5) that in the aggregate, protection of listed species can have a substantial economic effect, Opp. at 13-14; (6) that this Court's decision in *Gonzales v. Raich*, 545 U.S. 1 (2005), supports the decision below, Opp. at 15-16; and (7) that the courts of appeals have uniformly sustained the constitutionality of the "take" prohibition of the ESA, Opp. at 16-17.

Standing alone, the inability of the government to articulate a consistent constitutional theory for regulating intrastate, noncommercial species generally, and the Alabama sturgeon in particular, warrants review by this Court. If neither Congress, nor the lower courts, nor the Executive Branch, can identify the source of federal power for the most

far-reaching environmental law in the Nation's history, this Court must act to resolve the question.

### 1. The Regulation of Government Activity Is Not Enough to Sustain the Listing of the Alabama Sturgeon

The government's leading argument in its opposition is that even if the listing of the Alabama sturgeon as an endangered species is unconstitutional under the Commerce Clause, "Congress has ample constitutional authority to direct Executive Branch agencies to conduct their *own* activities in ways that are protective of listed species." Opp. at 7. Whether that authority is sufficient in this case was not addressed below. The government never argued below, as here, that the Spending and Property Clauses support ESA regulation. Below, the government relied on the Armed Forces Clause—an argument it subsequently abandoned and which "was not preserved." Opp. at n.3.

Although no response to this argument is required, because the issue is not properly before the Court, it suffices to say that the listing of the Alabama sturgeon does not implicate only federal action. When a species is listed, private conduct is automatically controlled through the Section 9 "take" prohibition, the Section 10 permit requirement, and the Section 7 mitigation standards, as well as other provisions of the Act. The argument that Congress can direct *federal* action, and therefore list species so as to direct *private* action, is simply inadequate to respond to Petitioners' constitutional challenge. The government was prudent in abandoning the argument below.

### 2. The Purported Regulation of Petitioners' Commercial Activity Is Not Enough to Sustain the Listing of the Alabama Sturgeon

The government claims Petitioners' own commercial activities are well within Congress' authority to regulate under the ESA.[1] Opp. at 9. But the government misses the lessons of *Lopez* and *Morrison*. Those cases turned on whether the challenged provision purported to regulate *economic* activity, by its own terms. In those cases, as in this, they did not. Therefore, this Court determined the Gun Free School Zones Act and the Violence Against Women Act were not enacted in furtherance of the commerce power.

In this case, Petitioners challenge the listing of the Alabama sturgeon. But the listing provision by its own terms excludes a consideration of the economic effects of the species, requiring instead that the Secretary make listing determinations solely on the basis of the biological status of the species. *See* 16 U.S.C. § 1533(b)(1)(A). Therefore, Petitioners' commercial activities, while relevant to standing, are irrelevant to the listing determination and to the constitutional challenge in this case.

The problem with the listing process, as we learn from *Lopez* and *Morrison*, is that the listing provision "has no express jurisdictional element which might

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[1] This position is inconsistent with the claims of the U.S. Fish and Wildlife Service in the final rule that the listing of the Alabama sturgeon would have virtually no impact on in-stream commercial activities. *See* 65 Fed. Reg. 26438, 26450, 26458, and 26460-61 (May 5, 2000).

limit its reach to a discrete set of [activities that] have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562.

### 3. The ESA Does Not Purport to Regulate Channels of Interstate Commerce

The government asserts it can regulate Petitioner's conduct in the sturgeon's habitat—a navigable water—as a channel of interstate commerce. Opp. at 10. But the fallacy in this argument is self-evident; the ESA does not purport to regulate the "use of the channels of interstate commerce." That fact is as determinative here as it was in *Lopez* and *Morrison*. *See Lopez*, 514 U.S. at 558. Every court to consider the matter has determined the ESA must be sustained, if at all, as a regulation of activity that "substantially affects" interstate commerce. Indeed, the circuit conflict derives from the differing rationales employed in applying the "substantial effects" test to the constitutional question.

### 4. Speculative Commercial Effects Are Not Enough to Sustain the Listing of the Alabama Sturgeon

The government argues Congress can apply the commerce power to regulate the Alabama sturgeon in anticipation of a future sturgeon market.[2] Opp. at n.5.

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[2] The government overstates the Alabama sturgeon's historical uses. The only possible record evidence of any commercial catch of the Alabama sturgeon dates back to 1898. *see* 65 Fed. Reg. at 26439, but that report did not specify if the "sturgeon" catch included the Alabama sturgeon. Also, the Fish and Wildlife Service conceded below that the Alabama sturgeon was not a (continued...)

Although some lower court judges have advanced this theory, it borders on the absurd. This Court has never upheld a Commerce Clause enactment based on a speculative, future market. *See Jones v. United States*, 529 U.S. 848, 859 (2000) (interpreting a federal arson statute to cover "only property *currently* used in commerce," where a contrary interpretation would have raised serious constitutional problems under *Lopez*) (emphasis added).

Moreover, this approach is the quintessential example of federal regulation without limits. A future market can be conceived for any tangible object, including leaves or rocks, if only among collectors. The theory that Congress can regulate activity now to ensure the *possibility* of a market in the uncertain future has no basis in constitutional law.

### 5. Under *Lopez* and *Morrison* Only Economic Activity May Be Aggregated

The government maintains that the commercial effects of all species may be aggregated to find a substantial effect on interstate commerce. Opp. at 14. But this is also contrary to *Lopez* and *Morrison*. In *Lopez* this Court held the Gun Free School Zones Act was a criminal statute that by its terms had nothing to do with "commerce" or any sort of economic enterprise and that Section 922(q) was not an essential part of a larger regulation of economic activity. *See Lopez*, 514 U.S. at 560. Therefore, this Court concluded the provision could not "be sustained under our cases

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[2] (...continued)
commercial source of caviar.

upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.*

This rule of law is equally applicable here; the listing provision of the ESA "by its terms has nothing to do with 'commerce' or any sort of economic enterprise." *See id.* Nor is it "an essential part of a larger regulation of economic activity." *See id.* Therefore, the listing of the Alabama sturgeon cannot be based on its aggregate effect with all other species.

### 6. This Court's Decision in *Raich* Is Inapplicable

Contrary to the government's assertion, Opp. at 15, this Court's decision in *Raich* is not applicable to this case. *See* Petition at 27-29. In summary, the ESA is not an economic market scheme like the Controlled Substances Act in *Raich* which covered the entire market in drugs. The ESA is a conservation statute that does not purport to regulate any market. Therefore, it is not an economic regulatory scheme and the listing of the Alabama sturgeon is not a trivial instance of a class of economic regulation that can be upheld based on its substantial effects on interstate commerce.

### 7. Lower Court Decisions Upholding the ESA Against Constitutional Challenge Have Been Anything but Uniform

The government's statement that the "courts of appeal that have considered the question have uniformly sustained the constitutionality of the 'take' prohibition contained in Section 9 of the ESA," Opp. at

16-17, is misleading and begs the question. Petitioners do not challenge the "take" prohibition challenged in other cases. This is the first time this Court has been asked to address the application of the ESA to a listing decision. In addition, as noted above, the circuits have been unable to agree on a uniform constitutional rationale that would protect the ESA from constitutional challenge. And in this litigation the government has been unable to articulate any consistent basis for listing intrastate, noncommercial species. It is this very lack of uniformity that calls for resolution by this Court.

## CONCLUSION

For the forgoing reasons review should be granted.

DATED: November, 2007.

Respectfully submitted,

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